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IN THE

Supreme Court of the United States

October Term, 1965.

No. 42.

RALPH GINZBURG, et al., *Petitioners,*

v.

UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF AMICUS CURIAE OF THE BUREAU OF INDEPENDENT PUBLISHERS AND DISTRIBUTORS IN SUPPORT OF PETITION FOR REHEARING.

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INTEREST OF THE AMICUS CURIAE.

The Bureau of Independent Publishers and Distributors is a nationwide association. Its membership embraces both publishers and national distributors of magazines and paperback books. The magazines include virtually all the popular periodicals, such as *Life, The Ladies' Home Journal, Readers' Digest, Fortune* and the *New Republic,* among many others; while the books include a spectrum of titles from *The Bible,* Dante and Dickens to *Ulysses, Lady Chatterley's Lover* and Margaret Mead. The members of the association handle more than half the volume

of publishing and distributing of such publications to newsstands and other retail outlets throughout the United States.[1] The Bureau views with grave concern the new exception carved by the majority opinion in No. 42 in the protection the First Amendment affords those who publish and distribute as well as their reader customers. Such concern necessarily becomes greater as the standard imposed by the Constitution upon the overzealous prosecutor and the self-appointed "morals" vigilante becomes more vague.

The Bureau and its members have a direct interest in the ruling of the majority in this case and it is an interest which did not exist until the decision itself revealed that a novel standard had been laid down. So long as the issues in the case were simply those passed upon by the two courts below, the Bureau's interest was only peripheral. For, while judges and individuals might differ as to the existence of redeeming social importance or prurient appeal, the finding that a given work was obscene on its face would be limited to the work itself. This Court's mature and reasoned articulation of the scope of obscenity in cases[2] dealing with varied works on their face would have restrained the censor and the vigilante even if the Court had agreed with the trial judge and found any of the three works mailed by defendant Ginzburg obscene.[3] The startling rationale actually adopted by the majority opens Pandora's box, and does so as much by the way the result was reached as by the result itself.

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1. The Bureau's members have never handled the distribution of the works involved in No. 42, which sold by mail, nor those involved in No. 49, a companion case, which sold through Appellants own store.

2. *E.g., Memoirs v. Massachusetts,* 34 U. S. L. Week 4236 (decided March 21, 1966) (*Fanny Hill*); *Grove Press v. Gerstein,* 378 U. S. 577 (*Tropic of Cancer*); *Jacobellis v. Ohio,* 378 U. S. 184 (Movie "The Lovers"); see *Grove Press v. Christenberry,* 276 F. 2d 433 (2d Cir. 1960) (*Lady Chatterley's Lover*).

3. Thus we have no quarrel with the Court's straightforward opinion and judgment in No. 49, except as it relies on the instant case.

It is this unforeseen novelty and the very real threat of unjustified oppression it poses which prompts the Bureau to ask this Court to listen to its views. If such a request might be belated in an ordinary case, it is not so here, for this is a most extraordinary case indeed.

Defendant Ginzburg was both a publisher and a distributor, and unless vacated the novel resolution of his fate by this Court will inevitably have a far-reaching negative effect on all publishers and distributors, their businesses and the community they serve.

All parties consent to the filing of this Brief *Amicus Curiae*.

ARGUMENT.

I. Introduction.

On February 14 of this year a Russian trial court in Moscow sentenced a man to five years in prison for writing a book and another to seven years for the same offense. The contents of the book had been found by the court to violate express statutory prohibitions. A month later on March 21 this Court affirmed a conviction which likewise sentenced a man to five years in prison for mailing the writings of others. In contrast to the Russian court, this Court assumed that the contents of these publications did not violate any statutory prohibition. The Russian authors were accused, and after full defense with counsel, convicted of uttering overt statements which endangered the state. The defendant Ginzburg, in dramatic contrast, was left subject to five years imprisonment (without opportunity to defend: nothing in the statute, indictment or charge informed him of the new crime this Court would create) on the sole basis of the criterion—not of having a "dirty mind"—but, if we read the majority's opinion right, of acting upon what the majority believed to be a *cynical view* of the "dirty minds" of others. This criterion was first announced in the very opinion which precluded any defense unless rehearing is granted.

II. The New Criterion.

In addition to affirming the "stark fact" of Ginzburg's sentence,[4] the majority in this case attempts to lay down for the future a new criterion for judging criminality in the publication or distribution of printed matter under the Federal and inevitably under the State statutes. This criterion is disastrously vague and consequently dangerously oppressive. It must be reconsidered.

4. Which constituted a retroactive application of the new standard of guilt.

In Russia the publication and distribution of literature is rigidly controlled by the state. Therefore "free speech" cases there occur at the basic level of the author's personal utterance. In our free and more complex society, in contrast, the issue of "free speech" invariably arises in the context of publication or distribution.[5]

In such a context the issues of free speech are both more subtly complex and, we submit, more important than in the area of an individual artist's conscience. Artists from Socrates to Andrei Sinyavsky have knowingly and willingly courted disaster as the price of honesty in their speech. Publishers and distributors however are primarily business men, who in our society cannot reasonably be expected to do the same, and will not. Therefore it is precisely with the nonobscene book containing "the requisite prurient appeal"[6] that the necessity for clear legal standards becomes so great.

Any publisher and distributor is bound to know that such a book will appeal to some, and probably to many, solely on the basis of its prurience. The reasonable publisher or distributor must also know that this fact will easily translate into good business and he will want that business. The majority opinion herein now for the first time makes criminality turn upon the dim and uncertain point at which his honest businessman's evaluation dissolves into the cynical "leer of the sensualist." Such a a subjective mental standard is impossible to enforce properly.

While the majority opinion purports[7] to resolve the question of when this subtle mental transition from the

5. See generally Note, *Entertainment: Public Pressures and the Law,* 71 HARV. L. REV. 326 (1957).

6. *Memoirs v. Massachusetts,* 34 U. S. L. Week 4236, at 4237 (decided March 21, 1966).

7. The objective reader of the majority's opinion cannot help but conclude that what the majority took to be defendant Ginzburg's cynicism about the prurience of his fellows became the crux of his guilt.

honest and business-like attitude to the cynical and criminal attitude on the basis of what it presumably took to be "objective" standards—actions and written advertisements, the least analysis shows that the criterion must inevitably be the subjective state of a defendant's mind. The circulars and prefaces and other overt expressions of defendant Ginzburg's supposed mental attitude [8] are all entirely compatible with a mental attitude which, like D. H. Lawrence's, advocates a sincere and profound philosophy of entire freedom in sexual behavior and discussion, or, even more so, with one espousing the editorial views of a magazine like *Playboy,* which displays a mixed mental attitude—both philosophical and titillating at the same time.[9]

In the face of such ambiguity of intent in the words themselves, this Court concluded (without aid of findings below) that these quasi-philosophical advertisements were not expressions of a sincerely held philosophy, as they purported to be. The Court therefore must have reached an ultimate conclusion as to the sincerity or cynicism of defendant Ginzburg's inner personal motives and based its judgment on that. By so deciding this Court obliges courts in the future to do likewise, since the true panderer will, as many already do, puff his products with cynically chaste statements such as: "This work is not obscene," or "This work comes to you by special decision of the United States Supreme Court," [10] or cynically refrain from any statement at all. The public will know, but only scrutiny of the defendant's soul and conscience can convict a party who is really guilty under the Court's new standard.

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8. See, *e.g.,* footnote 9 of the majority opinion. We cannot believe that this Court has given dispositive weight, in upholding a five year sentence, to the grade school *double entendre* of the mailing gimmick sought for the subject publications.

9. In this regard compare the works of numerous philosopher-sensualists, such as the Marquis de Sade or Jean Genet.

10. Such an advertisement actually appeared in front of a movie house in Philadelphia, Pennsylvania, in the Fall of 1965.

When Milton wrote: "Give me the liberty to know, to utter, and to argue according to conscience, above all liberties,"[11] the "conscience" he referred to was the writer's own. He rebuked clerical censors for attempting to judge it. This Court's decision makes trial of conscience the new crux of criminal obscenity prosecutions and inevitably invites repression, as we show below. To promulgate this dubious guide for the future it permitted the defendant Ginzburg to go to prison for five years.

III. The Impact of the New Standard.

The most serious threat to the rights of distributors and publishers who constitute the members of the Bureau, to their businesses and to their customers, the citizens and readers of this country, is the fear of prosecution and persecution for the handling of entirely acceptable publications which involve sex.[12] Only firm and continuing correction by this and other appellate courts has kept these usually self-selected "vigilantes" from imposing their limited views upon the community through harassment of what is for the Bureau's members their livelihood.[13] Far more common than the "panderer" whom this Court believes it finds criminally exploiting sex for *gain*, is the honest businessman who can be forced to "voluntarily" *suppress* valuable commentary, sexual, political or religious, because he fears *loss* of livelihood through unjustified, but all-too-common prosecution and unofficial harassment. Previously, when a work was declared not obscene on its face, after long and difficult litigation, the distributor could rely on the finality of that decision. The present decision of the

11. MILTON, POETRY & PROSE 718, Modern Library College Ed. (1950) ("Areopagitica").

12. See Note, Extralegal Censorship of Literature, 33 N. Y. U. L. REV. 989 (1958). This Note discusses the numerous works, most of them innocuous, which have fallen subject to censorship in various parts of the country.

13. *E.g., Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrant*, 367 U. S. 717; see cases cited *supra*, n. 2.

Court, however, by making the criterion of unlawfulness the setting of the work, rather than the work itself, tears down this climate of confidence in which the honest distributor of literature could operate and indiscriminately invites the Comstock back to persecute and prosecute in each new "setting."

However sincere a distributor may be and however clear his conscience, his handling of a book that offends Comstock convicts that dealer in the self-appointed censor's eye. On trial he will probably be acquitted (though the vagueness of the new criterion makes the nature of exculpatory proof a mystery), but the trial which this Court's new standard will have invited will frighten from the market all books even slightly suspect, in a flurry of self-censorship. And those who do not use self-censorship of border line books will necessarily stand convicted of "pandering" in the public eye for being so "brazen" as to try to make a living from the distribution of "such books."

For example, many of the Bureau's members distribute the book known as *Lady Chatterley's Lover* by D. H. Lawrence. Because of its great notoriety—derived in great measure from past repression and court holdings that it is not at all obscene—it is a book which some people undoubtedly buy because of its appeal to their prurient interest. Some of movant's members may be aware of this fact. They undeniably make their living by publishing or distributing this book among others. Will there now be a new prosecution? Must this Court hear the case of this great and important novel all over again?[14] The honest

14. The likelihood is confirmed by Justice Musmanno, dissenting from a recent decision of the Pennsylvania Supreme Court in *Commonwealth v. Robin*, decided March 22, 1966, overturning, on the strength of *Grove Press v. Gerstein*, 378 U. S. 577, a conviction for selling *Tropic of Cancer*. Forecast the Justice:

> "I refuse to accept the thought that once a decision is rendered on any particular subject, this means the last bell has rung, the last whistle has blown, the last nail has been driven, the last rivet

and conscientious distributor will feel safer removing the book from circulation. The same will be true for such literature as *Ulysses, Memoirs of Hecate County* or *Tropic of Cancer,* as well as those less savory publications involved in *Manual Enterprises v. Day,* 370 U. S. 478, and similar cases. These will come up not once but presumably time after time, as the local prosecutor finds a changed "setting", a dubious preface, or a titillating cover.

We cannot close without pointing out a distinct and equally grave threat implicit in the majority's decision. In matters of criminal procedure this Court has been scrupulous in safeguarding the rights of the accused, regardless of the nature or magnitude of the crime charged. It has insisted on the constitutional guarantee of counsel [15] and fair trial. Even outside the area of criminal law the Court has been careful to afford procedural due process. Thus, in the case of *Malat v. Riddell, District Director,* 34 U. S. L. Week 4267 (decided March 21, 1966), handed down immediately after the present case, the Court, after construing the Internal Revenue Code, said:

> "Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the

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has been hammered, the last bus has departed, and all that is left to do is to wait until Judgment Day." Philadelphia Legal Intelligencer, March 29, 1966, p. 8.

To confirm his view that *Cancer* must be tried again despite this Court's ruling, Justice Musmanno resorts to *the preface* to support his views:

> "The preface to 'Cancer' characterizes its worthlessness when it tells the reader:
>
> > 'Let us try to look at it with the eyes of a Patagonian for whom all that is sacred and taboo in our world is meaningless.'" *Id.* p. 7.

15. *Gideon v. Wainwright,* 372 U. S. 335.

> District Court for fresh fact-findings, addressed to the statute as we have now construed it.
>
> Vacated and remanded."[16]

In dramatic contrast, the Court here sustained defendant Ginzburg's conviction expressly and solely on the basis of the supposed state of his conscience when he mailed the articles in question,[17] an issue upon which Ginzburg had not been tried and as to which his counsel had not defended him. Still worse, this Court found the state of his conscience wholly bad and sustained his conviction on that ground alone, with no support at all in the findings of the trial judge who heard defendant and the other witnesses. Finally, upon announcing a new construction giving new reach to the Federal obscenity statute, the Court simply affirmed and did not remand as is the usual custom. Such a procedure on the part of the Supreme Court of South Carolina was held unconstitutional in *Bouie v. City of Columbia*, 378 U. S. 347 (Brennan, J.).

Such disregard of fundamental due process and equal protection by this Court defies explanation. But this brief is not concerned with criminal procedure. The grave danger which lurks in the cavalier special treatment which the majority decision metes out to defendant Ginzburg, is the implicit recognition that in the area of obscenity prosecution the Constitution carves out a lenient exception to the stringent standards it demands in all other areas of criminal law. This, more than the vague new criterion

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16. In the course of its *Malat* opinion the Court said:

> "As we have often said, 'the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses.'"

In the present case, even if the First Amendment permits a statutory prohibition of obscene matter turning on the subjective criterion announced by the Court, 28 U. S. C. § 1461 does not, if read in its "ordinary, everyday sense," extend to the new constitutional limit. Thus this Court denied to defendant Ginzburg protection of the law equal to that afforded Mr. Malat.

17. The decision of the courts below expressly rested on their view of the obscene nature of the contents of the printed works "cover to cover." 224 F. Supp. at 137; 338 F. 2d at 16.

itself, will encourage the eager prosecutor, up for re-election, to try his own novel theory of obscenity, however wrongheaded, and to rationalize that if this Court could change the rules in midstream for Ginzburg, it *might* do so for his current defendant.

Because its decision was uniquely unfair to a criminal defendant and because it lays down a standard dangerous to publishers and distributors everywhere and to free speech, the Bureau urges the Court to rehear, and, after briefs and oral argument on the legality of the new criterion announced by the majority opinion, to reverse the decision below.

Respectfully submitted,

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